FILED

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IN THE

Supreme Court of the United States

October Term, 1993

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

KIMBERLY L. MOODY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Dated: March 17, 1994

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Question Presented

Whether a provision of the federal Family Support Act of 1988, designed to increase the amount and uniformity of child support awards issued against non-custodial parents in State courts by establishing a rebuttable presumption that such awards are correct when issued in accordance with State guidelines, preempts State legislatures from establishing child support award minima in addition to the State guidelines.

Parties

The parties to the proceeding below were:

1. Steven D. Rose, Commissioner of the Oswego County Department of Social Services, on behalf of Edith L. Clancy, Petitioner;

2. Kimberly L. Moody, Respondent;

3. Attorney General of the State of New York; Intervenor.[1]

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*The Attorney General appeared as intervenor in this matter pursuant to his statutory authority under New York Executive Law § 71.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

KIMBERLY L. MOODY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petition for a Writ of Certiorari

The petitioner, the Attorney General of the State of New York, respectfully prays that a writ of certiorari issue to review the order of the New York State Court of Appeals entered in the above-entitled proceeding on December 20, 1993.

Opinions Below

The opinion of the Court of Appeals is reported at ____ NY2d ____ (December 20, 1993) (Westlaw 1993 WL 522515), and is reprinted in the appendix hereto, p. 3a, *infra*.

The opinion of the Appellate Division, Fourth Department, is reported at *Matter of Rose v Moody*, 188 AD2d 1001 (4th Dept 1992), and is reprinted in the appendix hereto, p. 18a, *infra*.

The opinions of the Oswego County Family Court and the Oswego County hearing officer are unreported and are reprinted in the appendix hereto, p. 21a and p. 25a, respectively.

Jurisdiction

The order of the Court of Appeals was entered on December 20, 1993. This petition for certiorari is filed within 90 days of December 20, 1993. The Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution, Article VI:

* * *

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

42 United States Code § 667:

(a) Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State * * *.

* * *

(b)(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

45 Code of Federal Regulations § 302.56:

> (a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.
>
> * * *
>
> (c) The guidelines established under paragraph (a) of this section must at a minimum:
>
> > (1) Take into consideration all earnings and income of the absent parent;
> >
> > (2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation * * *.
>
> * * *
>
> (f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.
>
> (g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the

guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

New York Family Court Act 413(1)(g):

Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided however, and notwithstanding any other provision of law, including but not limited to section four hundred fifteen of this

act, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. In no instance shall the court order child support below twenty-five dollars per month. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount of a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

Statement of the Case

Statutory Background

In an effort to improve nationwide practices in the enforcement of parental financial responsibility for children, the Congress enacted Title IV-D of the Social Security Act in 1975. *See*, 42 USC §§ 651-669, as amended. In its current form, Title IV-D contains provisions for, *inter alia*, the creation and use of a federal Parent Locator Service to assist in the location of absent parents; the creation of State plans for child and spousal support; and the issuance of incentive payments and program payments to States which create programs under the Title. *See*, 42 USC §§ 653-655.

In 1984, the Congress amended Title IV-D to address, *inter alia*, two problems rooted in the broad discretion which most States afforded family law judicial and administrative officers: low dollar amounts and excessive variation in the amounts of child support awards against non-custo-

dial parents. Through provisions of the Child Support Enforcement Amendments of 1984, Pub L No. 98-378, 98 Stat 1305, §§ 3-5, the Congress directed the States to make available to courts and agencies non-binding guidelines for the issuance of support awards. *See*, Note, *The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution*, 56 Brooklyn L Rev 1299, 1301-1307 (1991). In 1988, the Congress amended the provision to mandate the use of such guidelines by State judges and officials as a condition for receipt of federal funds for the implementation of the State's child support enforcement program under 42 USC § 654 and § 655. *See*, Family Support Act of 1988, Pub L 100-485, 102 Stat 2343 § 103 (1988). In its current form, that mandate is contained in 42 USC § 667, which provides, in pertinent part, as follows (emphasis added):

> (a) Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State * * *.
>
> * * *
>
> (b)(2) *There shall be a rebuttable presumption*, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on

> the record that the application of the guidelines would be unjust or inappropriate in a particular case, *as determined under criteria established by the State*, shall be sufficient to rebut the presumption in that case.

The Family Support Act did not guide or limit the States' choice of the substantive content of support guidelines. Nor did it restrict the States' choice of factors for finding awards unjust or inappropriate, or restrain the States' power to set forth consequences or additional limitations upon State court judicial discretion in issuing child support awards. Likewise, regulations subsequently issued by the Office of Child Support Enforcement of the Department of Health and Human Services contained no limitations in State legislative authority in these areas. *See*, 45 CFR § 302.56.

Both the goals of the guidelines and the discretion left to the States in their imposition comported with the larger general purpose of the Family Support Act of 1988: to induce cooperation of the States in the alteration of the federal program of aid to families with dependent children by more strongly emphasizing within it the elements of work, responsibility for child support, and need-based family support supplements. *See*, House Conference Report No. 100-998, *reprinted in* 1988 US Code Cong & Admin News p 2879.[1]

In compliance with the federal Family Support Act, the New York State Legislature enacted the Child Support Standards Act, L 1989, ch 567 ("Standards Act"). Among

[1]To our knowledge, section 667(b)(2) is the only example of federal law in which a federally-established legal presumption is subject to rebuttal under State-established criteria.

its many provisions, the Standards Act imposed mandatory guidelines for the determination of child support awards (Family Court Act § 413[1][a]-[d]) and provided that a guidelines award, though presumptively correct, could be set aside if a judge or hearing officer found the award unjust or inappropriate in accordance with a list of criteria set forth in the statute (Family Court Act § 413[1][f]). The Standards Act also provided that, notwithstanding the guidelines and rebuttal criteria, no child support award could be issued against a non-custodial parent for an amount less than $25 per month (Family Court Act § 413[1][g]).[2] This minimum award provision implemented the Legislature's view that all parents are responsible for support of their children.[3]

The guidelines, rebuttal criteria, award minimum and other provisions of New York's Standards Act were made part of the State's plan for child and spousal support pursuant to 42 USC § 654, and were approved by the federal

---

[2]In cases where noncustodial parents were unable to pay an award because their income was below federal poverty income guidelines, the Act provided that the awards against such persons would accrue only to the amount of $500. Family Court Act § 413(1)(g). This $500 accrual is the minimum amount which triggers federal law provisions for the interception of tax refunds to pay support arrears. *See*, 42 USC § 664(b)(2)(A).

[3]This goal was echoed by the Approval Message issued by the Governor upon signing the Act. That message stated in pertinent part (1989 State of New York Legislative Digest 698):

> Even at the poverty level, a child support obligation of $25.00 per month is imposed. The Act, however, does not single out the poor. The fundamental premise of the Act is that both parents, whatever their marital status, have an obligation to contribute to the support of their children. It is for that reason that even the poorest of parents are obliged to contribute $25.00 to their children's support.

Department of Health and Human Services in accordance with 42 USC § 652(a).

Factual Background of the Instant Controversy

In January, 1991, the Oswego County Department of Social Services, pursuant to its statutory authority, filed a petition for support against respondent Kimberly L. Moody on behalf of her son Robert. At that time, Mrs. Moody resided with two other children and received public assistance from the County and State; Robert resided with his grandmother and also received public assistance. An Oswego County hearing examiner, determining that application of the statutory guidelines would require an imposition of an award of $25 per month against Mrs. Moody, concluded that such an award would be unjust or inappropriate in light of her financial circumstances (30a). Notwithstanding the minimum award provision of Family Court Act § 413(1)(g), the hearing examiner issued an award against Mrs. Moody in the amount of $0 per month (26a). On January 2, 1992, the Oswego County Family Court upheld the hearing examiner's order (21a-24a).

On December 30, 1992, the Appellate Division, Fourth Department affirmed the Family Court ruling, holding that the support award minimum under the Family Court Act § 413(1)(g) was in conflict with and was preempted by 42 USC § 667(b)(2) (18a-20a). *Matter of Rose v Moody*, 188

AD2d 1001 (4th Dept 1992), *Matter of Rose v Haney*, 188 AD2d 999 (4th Dept 1992).[4] The court observed (19a-20a):

> Because section 667(b)(2) of the Child Support Enforcement Act directly prohibits a State from enacting child support guidelines which permit no rebuttal of the amount awarded, we conclude that the provision in Family Court Act § 413 (g) [sic] mandating a $25 minimum award is preempted under the Supremacy Clause (*see*, US Const, art VI). Family Court, therefore, properly disregarded the minimum award requirement and determined that the imposition of any support obligation upon respondent would be unjust and inappropriate.

Following an appeal to the New York State Court of Appeals by both the Oswego County Department of Social Services and the New York State Attorney General, that Court affirmed the Fourth Department's holding. Without reference to the statutory criteria for rebuttal of the guidelines award amount, the Court determined that a support award in any amount against respondent Moody was unjust or inappropriate in light of her poverty (8a):

> In this case, the mother has satisfied one unassailable criterion to overcome the presumption that would require her to be obligated for support of her noncustodial son (*see*, Family Court Act §413[1][f]). She is indigent and needs Social Services financial

[4]This preemption issue was raised for the first time before the Appellate Division. Upon being informed of this constitutional challenge to section 413(1)(g), the Attorney General appeared before the Fourth Department in defense of the statute pursuant to New York Executive Law § 71.

> assistance for herself and her twin custodial children. Since she has nothing, she can pay nothing.

Without detailed discussion, the Court went on to find that imposition of a minimum award under such circumstances would conflict with the Federal statute (8a):

> The Family Court Act paradigm erects a facial, not implied, contradiction because the proviso in section 413(1)(g), that even where a guideline award is rebutted as unjust or inappropriate it must still result in a minimum award of no less than $25 per month. The prescribed national norms expressly provide for a substantively different mechanism.

The Court noted peripherally that judicial awards against public assistance recipients, though unenforceable against public assistance funds under State law, would "send wrong messages", "degrade the value and integrity of the judicial decree", and "unjustly and unaccountably brand the respondent parent a deadbeat" (10a).

One member of the Court of Appeals dissented, concluding that Mrs. Moody's attack upon section 413(1)(g) failed to satisfy the burden of a facial challenge under the Supremacy Clause (10a-14a [Levine, J., dissenting]). As the dissent observed, Mrs. Moody had failed to demonstrate that "no set of circumstances exists under which the Act would be valid" (11a); or that it was "impossible to comply with both state and federal law" (12a); or that the Congress had "positively required by direct enactment" that the State enactment in family law, traditionally an area of the laws of the States, should be preempted (12a). The dissent pointed

out that the federal statute nowhere addressed or prohibited the State's imposition of a minimum child support award independent of the guidelines required under 42 USC § 667 (11a, 13a). He found that the minimum child support award provision contained in section 413(1)(g) advanced the federal interests and policies underlying the Family Support Act of 1988, and was designed, like that Act, to strengthen child support obligation enforcement efforts (13a-14a). Finally, he observed that the award obligation against Mrs. Moody under the New York statute—an accumulation of arrears to a maximum of $500, to be collected only when Mrs. Moody had some independent ability to pay child support—posed at worst a *de minimis* conflict with 42 USC § 667(b)(2) (14a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in direct conflict with this Court's standard of review of State domestic relations law edicts under the Supremacy Clause, miscomprehends the language and purpose of the federal Family Support Act of 1988, and improperly restrains the power of State legislatures to regulate the practice of State judiciaries in the area of state domestic relations law.

This Court has long recognized a stringent standard for review under the Supremacy Clause of State statutes addressing matters of family law. As it summarized in *Hisquierdo v Hisquierdo*, 439 US 572, 581 (1979):

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the

> laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). . . . On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. *Wetmore v Markoe*, 196 U.S. 68, 77 (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. *United States v Yazell*, 382 U.S. 341, 352 (1966).

This lengthy tradition of exceptional deference by this Court and federal authorities to State enactments on family law matters has benefits identical to those which ensue from the federalist structure of joint sovereigns. *Cf.*, *Gregory v Ashcroft*, ____ US ____, 111 S Ct 2395, 2399-2400, 115 L Ed 2d 410, 422 (1991) (setting forth advantages of federalist system). Among these benefits is the States' power to engage in a variety of approaches to resolving problems of family life, unhampered by restraints posed by the federal government or judiciary. *See*, *Gregory*, 111 S Ct at 2399; *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"). New York's imposition of a minimum financial obligation upon non-custodial spouses obliged to provide child support is a prime instance of such social experimentation.

The scope of the States' powers over family law matters is not without limits, of course. Especially where the Congress has acted pursuant to its spending power, as in the matter at bar, it may encourage the States to limit such experimentation to comport with a single federal administrative scheme or practice. Yet even under these circumstances, courts reviewing a Supremacy Clause challenge have an obligation to avoid constitutional conflicts which unnecessarily diminish the independent power of States to develop the law of familial relations. *See, New York State Department of Social Services v Dublino*, 413 US 405, 413-414 (1973) (stringent preemption principles apply to States' Aid to Families with Dependent Children programs, funded in part by federal government under spending power); *Hisquierdo*, 439 US at 581; *United States v Yazell*, 382 US 341, 352 (1966) (in the absence of legislation by Congress directly overriding state law, Court will show "solicitude for state interests", particularly in the field of family law). *See also, Gregory v Ashcroft*, 111 S Ct at 2400 (congressional legislation in areas traditionally regulated by the State is an "extraordinary power" in a federalist system; Court "must assume Congress does not exercise [this power] lightly").

In the matter at bar, the court below failed to fulfill this obligation of judicial review, declining to examine the State and federal interests at issue in this matter or to inquire whether the Family Court Act caused "major damage" to "clear and substantial" federal interests sufficient to warrant the finding of a Supremacy Clause conflict.

Contrary to the unsupported conclusions of the Court of Appeals, the federal statutory provisions of the Family Support Act of 1988 expressly delegated to the States full

authority to structure their child support award practices and to establish the factors through which support awards would be issued. Indeed, the provision for a minimum child support award was nowhere addressed in the federal legislation. Since that provision is an alternative to and distinct from the generation of a guidelines award under Family Court Act § 413(1)(a)-(d), the statutory minimum stands logically apart from the rebuttable presumption provision, which was designed only to provide flexibility in the issuance of award amounts generated by the guidelines. As the dissent noted, the Court's finding of a statutory conflict was based largely and mistakenly on inference and implication (1a).

Moreover, the State's minimum award provision is in all respects compatible with the federal guidelines scheme. As we have noted above, the principal purposes of the amendment of 42 USC § 667 under the Family Support Act of 1988 was to increase the amount and consistency of child support awards issued by State judges and administrative officers. Non-binding guidelines had proved insufficient to achieve this end prior to 1988; the amendments were designed to provide a more forceful remedy. Not wishing to impose iron-clad rules denying State judges all discretion in the issuance of support awards, however, the Congress merely provided that each State set forth *some* criteria for rebuttal of guideline award figures as "unjust or inappropriate", leaving to the States the responsibility to choose and promulgate these criteria. 42 USC § 442(b)(2). Nothing in the federal statute sets forth particular criteria which the States must employ in this fashion. For instance, the Congress did not declare that the impoverished condition of a non-custodial parent such as Mrs. Moody, or her lack of income, or her receipt of public assistance, should neces-

sarily enable a judge to reject the guideline award figure. Nor did it declare that the State's rebuttal criteria must be applicable to all awards cases. *Cf*, 56 Fed Reg 22335, 22348, Comment 7 (federal statute permits great leeway in establishing restrictive rebuttal criteria, barring only "State guidelines which are applied in all cases with no opportunity for rebuttal of the amount indicated under the guidelines").

In enacting the guidelines and rebuttal criteria contained in Family Court Act § 413(1)(g), the New York State Legislature fully complied with the requirements of 42 USC § 667. The Legislature further determined that parents and children in New York would benefit by a uniform restraint upon the discretion of State court judges in the setting of child support awards in addition to the federally required guidelines and rebuttal criteria: a reasonable minimum award, effectively prohibiting the reduction of all awards to an amount below $25 per month.[5] Such a minimum award advances the general federal purpose of limiting variability and increasing the amount of awards. The State legislative purpose advanced by the minimum award—a policy decision that *all* parents, even the most impoverished, must share financial responsibility for the care of their children—poses no conflict with the federal goals of the Family Support Act.

The Court of Appeals greatly miscomprehended the limited purpose of the federal rebuttal requirement. Ignoring the federal scheme's provision that an award could be held "unjust or inappropriate" only in accordance with criteria

[5]Other sections of the New York guidelines scheme provide that no award under the guidelines will amount to less than $25 per month. *See*, Family Court Act § 413(1)(d).

set forth by the States, the Court found that an award against a public assistance recipient such as Mrs. Moody was unjust or inappropriate simply because the recipient was impoverished—a reason expressly disavowed as a grounds for rebuttal by the New York State Legislature (to the extent of $25 per month). In so doing, the Court thwarted both federal and State legislative language and intent. Ironically, this judicial action was undertaken in the defense of a federal statute designed to restrict State Court judicial discretion over the issuance of child support awards and eviscerated a State statutory provision which federal authorities had approved as part of the New York child support plan. This too was error.

In addition to occasioning uncertainty and significant inconvenience for the State of New York,[6] we believe that the Court of Appeals holding erroneously undermines a novel and significant federal legislative strategy of partnership with the States in the erection of a flexible nationwide child support enforcement system—a strategy designed to preserve to the State the greatest possible authority over family law matters. Ignoring this congressional intent, the Court's decision unnecessarily and erroneously restricts State legislative power in a traditional field of State law. For these reasons, and because the Court's decision displays a complete disregard for the standards of judicial review of claims under the Supremacy Clause, we believe that the decision warrants review and reversal by this Court.

---

[6]In light of *Rose*, there is some doubt as to whether New York's child support enforcement program currently complies with federal requirements.

CONCLUSION

This Court should grant a writ of certiorari.

Dated: Albany, New York
March 17, 1994

Respectfully submitted,

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APPENDIX A—Order of the Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding.

IN THE MATTER OF STEVEN D. ROSE, COMMISSIONER OF OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, &C.,

Appellant,

against

KIMBERLY L. MOODY,

Respondent.

No. 269

The appellant in the above entitled appeal appeared by The Seiter Law Firm; intervenor-appellant appeared by Hon. Robert Abrams, Attorney General of the State of New York; the respondent appeared by Heidi Siegfried, Esq. of Legal Services of Central New York, Inc.; and *amici curiae* appeared by Wayne G. Hawley, Esq. and Thomas Maligno, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Kaye and Judges Simons, Titone,

Hancock and Smith concur. Judge Levine dissents and votes to reverse in an opinion.

The Court further orders that this record of the proceedings in this Court be remitted to the Family Court, Oswego County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
December 20, 1993.

APPENDIX B—Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF STEVEN D. ROSE, COMMISSIONER OF OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, &C.,

Appellant,

against

KIMBERLY L. MOODY,

Respondent.

No. 269

OPINION: This opinion is uncorrected and subject to revision before publication in the New York Reports.

John McConnell, for Attorney General; Kevin C. Caraccioli, for appellant; Heidi Siegfried, for respondent; MFY Legal Services, Inc. *et al., amici curiae.*

BELLACOSA, J.:

Respondent mother has custody of two of her children and subsists on Social Services financial aid. Family Court rejected petitioner Oswego County Social Services Commissioner's objections to the Hearing Examiner's findings

and determination that the respondent mother's child support obligation for her third, noncustodial child was $0. The Commissioner and Intervenor Attorney-General of the State of New York appeal as of right on constitutional grounds from the Appellate Division's order affirming Family Court. They argue that New York's Family Court Act §413(1)(g), which conclusively fixes a minimum $25 per month floor in all cases, is not preemptively nullified by any conflict with Federal law 42 USC §667, which mandates a rebuttable presumption in all such instances. We disagree and affirm the determination of both lower courts in favor of the respondent indigent mother.

Where a Federal statute facially clashes with a State statute, the Federal statute must triumph. New York State's Family Court Act §413(1)(g) creates an irrebuttable presumption imposing, in cases like this one, a $25 per month floor on all child support obligations up to an accumulated debt of $500. Thus, it flatly contradicts the enabling legislation, 42 USC §667, that commands an opportunity in all cases to rebut and drop the support award floor to $0, when impoverished circumstances so dictate.

I.

Respondent has three children. At the commencement of this proceeding, her two-year-old twins lived with her; her first born, Robert, age 4, lived with his grandmother. He is, thus, a noncustodial child for purposes of §413(1)(g) of the Family Court Act. The mother and her children are entirely dependent upon the Department of Social Services for financial living assistance.

In January 1991, the Oswego County Department of Social Services filed a petition for support against the mother on behalf of the grandmother and the noncustodial child,

Robert. The Family Court Hearing Examiner found against the Commissioner and directed an award of $0 per month in child support against the mother for Robert. The mother's income, pursuant to Family Court Act §413(1)(b)(5), was determined to be $0 annually. Her basic child support obligation under the formula of the Child Support Standards Act (Family Court Act Art. 4 [Support Proceedings]) was 17% of $0, which, of course, equals $0. He further determined that even though $0 is less than the poverty level, application of the New York State guidelines nevertheless would mandate a minimum child support obligation against her in the sum of $25 per month (Family Court Act §413[1][g]). The Hearing Examiner concluded that application of the mandatory minimum monthly award would be unjust and inappropriate, since the mother and her two custodial children were themselves recipients of public assistance.

Family Court upheld the finding of fact and the determination of the Hearing Examiner. The Appellate Division unanimously concluded that the Federal Child Support Act prohibits a state from creating a "conclusive presumption that $25 is the correct amount of child support to be awarded, regardless of the parent's means and circumstances" (188 AD2d 999, 1000). While it agreed with Family Court that the imposition of an uncollectible support figure would be unjust and inappropriate, it added that the conclusively mandated minimum award was also preempted by Federal law.

II.

The County and Intervenor assert a constitutional basis to support the appeal as of right. They argue that Family Court Act §413(1)(g) avoids the constitutional preemption conflict of an irrebuttable mandatory minimum of $25 per month as an obligation of child support against any noncustodial parent, because the figure is a justifiable, albeit *pro forma*, public policy message, not a true collectible obligation. 42 USC §667(b)(2) provides that the amount of an award under State child support guidelines shall be presumed correct, subject to rebuttable criteria established by the State which allow noncustodial parents to show inability to pay. By establishing an irrebuttable minimum of $25, even though concededly uncollectible and solely "to send a uniform public policy message," the State treads on the Federal mandate which gives a noncustodial parent the right to rebut any presumed support amount, all the way down to zero, by showing inability to pay. Thus, while a substantial constitutional question is directly involved in this appeal, we resolve the issue against the appellants.

New York participates in the federally funded reimbursement program designed to foster child support payments from noncustodial parents. The program promulgates national standards and guidelines. Pursuant to Federal statute, each participating state is required to adopt statewide guidelines in connection with child support awards as a condition for the state's receipt of Federal funds under 42 USC §654 and §655. New York has, thus, subjected itself to full compliance with the national regime by accepting Federal funds, a factor the dissent does not take cognizance of or credit.

Section 667 of the United States Family Support Act of 1988, entitled "State Guidelines for Child Support Awards," states in pertinent part:

> (b)(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case (42 USC §667).

The New York State Legislature in 1989 enacted the Child Support Standards Act (Family Court Act, Article 4 *et seq.*) pursuant to the enabling United States Family Support Act. The New York implementation opens with a provision that parents with sufficient means or ability to acquire such means shall be required to pay child support pursuant to the established guidelines (Family Court Act §413[1][a]).

Paragraph 413(1)(c) of the Family Court Act provides for application of guidelines based on a pro rata share of a certain percentage of the combined parental income. "Income", defined at section 413(1)(b)(5), does not include public assistance. The respondent mother's circumstances are such that her entire income is derived from public assistance. Thus, for purposes of the Family Court Act, she has $0 income. Family Court Act §413(1)(f) prescribes factors for deciding whether a guideline award is "unjust or inappropriate," and details the criteria or factors that should provide a basis to rebut the presumptive guidelines. For example, the financial resources of the custodial and non-custodial parent and those of the child are pertinent (Family Ct Act §413[1][f][1]). Also relevant are the financial needs of any children of the noncustodial parent not subject to the

particular support proceeding. A comparative resources analysis of the respective support needs of the custodial children and the noncustodial child who is the subject of the proceeding is also appropriate (Family Ct Act §413[1][f][8]).

In this case, the mother has satisfied one unassailable criterion to overcome the presumption that would require her to be obligated for support of her noncustodial son (*see*, Family Court Act §413[1][f]). She is indigent and needs Social Services financial assistance for herself and her twin custodial children. Since she has nothing, she can pay nothing. For a judicial decree to declare that she, nevertheless, owes what she cannot realistically or legally pay is not only unjust and inappropriate, it is a legal pretense. The Family Court Act paradigm erects a facial, not implied, contradiction because the proviso in section 413(1)(g), that even where a guideline award is rebutted as unjust or inappropriate it must still result in a minimum award of no less than $25 per month. The prescribed national norms expressly provide for a substantively different mechanism.

Family Court Act §413(1)(g) states in pertinent part:

> Where the court finds that the noncustodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the noncustodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation, and the reasons that the court did not order the basic child support obligation * * * * *In no instance shall the court order child support below twenty-five dollars per month.* Where the noncustodial parent's income

> is less then or equal to the poverty guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue (emphasis added).

Family Court observed that "to require her to pay $25 per month in support towards her noncustodial child lowers her current monthly public assistance cash allotment from $126 to $101, a substantial percentage decrease, and, arguably, a penalty per se for being a public charge." Since New York otherwise immunizes public assistance recipients from levy and execution of judgments against them, including judgments for child support (*see*, Social Service Law §137; *Consumer Credit Corp v Lewis*, 63 Misc 2d 928), the appellants' sought-after decree of a support obligation would be a mere showpiece.

Appellants also advocate that the interoperative effect of Family Court Act §413(1)(g) with Social Service Law §137 clearly and manifestly excuses a chargeable parent without income, such as the respondent mother here, from any real payment obligation to any child. This position highlights the insurmountable problems of their argument that Family Court Act §413(1)(g) may be de facto harmonized with its Federal source statute, while de jure contradicting it on its face and in its inevitable application.

The Appellate Division affirmed in this case, stating because 42 USC §667(b)(2) "directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded, we conclude that the provision in Family Court Act §413(1)(g) mandating a $25 minimum award is preempted under the Supremacy Clause" (*Rose v Moody*, 188 AD2d 999, 1000). We agree with that court that this is "directly prohibit[ed]," and that a perfunctory, le-

gally noncollectible judicial order of support is not authorized and would send wrong messages. It would degrade the value and integrity of the judicial decree, and it would unjustly and unaccountably brand the respondent parent a deadbeat.

Appellants' argument that Family Court abused its discretion is unavailing. So, too, is their claim that despite the fact that any percent of zero will inevitably equal zero, Family Court Act §413(1)(g) somehow constitutionally survives. The New York scheme cannot support a de jure irrebuttable presumption for the mandatory imposition of a minimum $25 per month statement of obligation against an indigent noncustodial parent.

The order of the Appellate Division should be affirmed, with costs.

LEVINE, J., dissenting:

I respectfully dissent. In my view, respondent has not satisfied her heavy burden of establishing the facial invalidity of the provision in New York's Child Support Standards Act (L 1989, ch 567) mandating a minimum court-ordered child support obligation of a non-custodial parent of $25 a month (Family Ct Act § 413 [1] [g]), regardless of whether the application of the statutory child support guidelines would result in a lower amount, or whether a court might find that the statutory minimum support award was unjust or inappropriate in a given case. Contrary to the conclusion of the Appellate Division and the majority here, Section 103 of the federal Family Support Act of 1988 (42 USC § 667 [b] [2]) does not expressly prohibit a state from imposing a statutory minimum child support obligation.

The federal statute requires the states to establish support guidelines (42 USC § 667 [a]). It provides that, in any

judicial or administrative child support proceeding "[t]here shall be a rebuttable presumption * * * that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded" (42 USC § 667 [b] [2]). The federal statute further provides that the presumption may be rebutted in a given case by a finding "that the *application of the guidelines* would be unjust or inappropriate", under criteria established by the state (*id.* [emphasis supplied]; *see,* Family Ct Act § 413 [1] [f]). As the quoted portion of the federal statute shows, the rebuttable presumption of section 667 (b) (2) does not deal directly with a state's minimum child support level imposed irrespective of "the application of the guidelines" (*id.*). The majority infers, however, that because section 667 stipulates that the presumption of the correctness of an award pursuant to the state guidelines is rebuttable, Congress must have intended to bar any irrebuttable statutory minimum award. Thus, it is only by implication that the federal statutory rebuttable presumption of a parental ability to pay a support award under the guidelines may be found to conflict with the mandatory $25 a month minimum child support award provision of the New York statute.

An individual attempting to establish the facial invalidity of a state statute under the Supremacy Clause (US Const art VI) by reason of an implied conflict with a federal statute faces serious hurdles. First, as in any facial challenge to the constitutionality of a statute (except perhaps on First Amendment grounds) it must be demonstrated "that no set of circumstances exists under which the Act would be valid" (*United States v Salerno,* 481 US 739, 745; *see also, Schall v Martin,* 467 US 253, 268-269 n 18).

When the invalidity of a state statute is asserted because of a conflict with federal law, it must be established that "it

is impossible to comply with both state and federal law, * * * or [that] the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" (*California Coastal Commn. v Granite Rock Co.*, 480 US 572, 581). Moreover, "[t]his inquiry requires [a court] to consider the relationship between state and federal laws as they are *interpreted and applied, not merely as they are written*" (*Jones v Rath Packing Co.*, 430 US 519, 526 [emphasis supplied]).

Finally, and most importantly, the constitutional standard for preemption applicable here is especially severe, under long-established principles, because New York's Child Support Standards Act deals with " 'the domestic relations of husband and wife, parent and child, [a subject which] belongs to the laws of the States and not to the laws of the United States' " (*Rose v Rose*, 481 US 619, 625 [quoting *In re Burrus*, 136 US 586, 593-594]. The Supreme Court has mandated exceptional deference to the states in matters regarding child support (481 US at 628). "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted" (*Hisquierdo v Hisquierdo*, 439 US 572, 581 [quoting *Wetmore v Markoe*, 196 US 68, 77]). "*A mere conflict in words is not sufficient.* State family * * * law must do *'major damage'* to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden" (439 US at 581, quoting *United States v Yazell*, 382 US 341, 352 [emphasis supplied]).

The purported conflict between Family Court Act § 413 (1) (g) and 42 USC § 667 (b) (2) simply does not meet those exacting standards for preemption. Taken literally, 42 USC § 667 (b) (2) merely insures that either the noncustodial *or*

the custodial parent has the opportunity to demonstrate that strict application of a state's child support guidelines is unjust or inappropriate, by showing that the resultant award is too onerous or insufficient to meet the child's needs, according to the state criteria. As already demonstrated, 42 USC § 667 (b) (2) does not directly address a state's imposition of a minimum child support obligation independent of any application of its guidelines. Thus, it has not even been conclusively shown here that there is a "conflict in words" between the federal and State enactments at issue.

Nor does providing for a statutory minimum obligation of child support impair in any significant way the "clear and substantial" federal interests and policies underlying the Family Support Act of 1988. Those policies and interests were "to restructure the basic program of public assistance for families in ways that *emphasize parental responsibility* through the *enforcement of child support*" (S Rep No. 377, 100th Cong, 2d Sess, reprinted in 1988 US Code Cong & Admin News 2776, 2778 [emphasis supplied]). The section mandating the presumptively binding effect of state child support guidelines is referred to collectively with other sections as "designed to strengthen the child support *enforcement* program" (*id.*, at 2779 [emphasis supplied]). Providing for a statutory minimum child support award of $25 a month surely does not do "major damage" to these primary Congressional policies and federal interests reflected in the Family Support Act of 1988. The absence here of any significant deviation from Congressional policies and federal interests is further demonstrated by the approval by the Secretary of Health and Human Services of the New York child support enforcement program through its Child Support Standards Act. Congress charged the Secretary with

the responsibility of reviewing, approving and auditing state child support enforcement programs to insure their conformity with the federal Family Support Act (42 USC § 652).

Finally, any purported conflict with section 667 (b) (2) of the federal statute is even more remote when one considers the interpretation and application of Family Court Act § 413 (1) (g) in conjunction with other State statutory provisions. Thus, by reason of statutory exemptions contained in Social Services Law §§ 137 and 137-a, respondent, whose exclusive source of income is receipt of public assistance, is not subject to present enforcement of the $25 a month minimum court-ordered child support obligation for her child living outside of her home. Moreover, Family Court Act § 413 (1) (g) further provides, in the case of a noncustodial parent whose income "is less than or equal to the poverty income guidelines amount for a single person", the accrual of arrears on respondent's child support obligation is statutorily limited to an aggregate of $500. Thus, the net effect of the minimum child support award mandated under this State's Child Support Standards Act is an accumulation of arrears of $25 a month to a maximum of $500, payment of which is unenforceable until respondent has attained some financial ability to pay child support. The conflict between this deferred obligation to pay child support arrears not exceeding $500 and the rebuttable presumption of 42 USC § 667 (b) (2) is thus so remote as to become, at worst, *de minimis*.

For all the foregoing reasons, I would reverse the order of the Appellate Division and remit this proceeding to the Family Court of Oswego County for the fixing of an appropriate award of support pursuant to the provisions of Family Court Act § 413.

* * *

Order affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Kaye and Judges Simons, Titone, Hancock and Smith concur. Judge Levine dissents and votes to reverse in an opinion.

Decided December 20, 1993

APPENDIX C—Order of the Appellate Division, Fourth Department

NEW YORK STATE SUPREME COURT

APPELLATE DIVISION, FOURTH DEPARTMENT

1174

MATTER OF STEVEN D. ROSE, COMMISSIONER OF OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O EDITH L. CLANCY,

Appellant,

v

KIMBERLY L. MOODY,

Respondent.

PRESENT: Callahan, J.P., Green, Balio, Davis, Doerr, JJ.

The above named Steven D. Rose, Commissioner of Oswego County Department of Social Services, o/b/o Edith L. Clancy, having appealed to this court from the order of the Oswego County Family Court, entered in the Office of the Clerk of said Court on January 2, 1992, and said appeal having been argued by Kevin Caraccioli of counsel for

appellant, Heidi Seigfried of counsel for respondent, submitted by John McConnell (pursuant to CPLR 1012[b]) of counsel for the Attorney General, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously affirmed without costs.

Same Memorandum as in *Matter of Rose v Haney* (____ AD2d ____ [decided Dec. 30, 1992]).

CARL M. DARNALL, Clerk

Entered: December 30, 1992

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York this DEC 30, 1992.

s/CARL M. DARNALL
Clerk

SEAL:
Supreme Court
Appellate Division
Fourth Department

APPENDIX D—Opinions of the Appellate Division, Fourth Department

1174. (Oswego Co.)—MATTER OF STEVEN D. ROSE, COMMISSIONER OF OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O EDITH L. CLANCY, APPELLANT, V KIMBERLY L. MOODY, RESPONDENT.—Order unanimously affirmed without costs. Same Memorandum as in Matter of Rose v Haney (____AD2d____[decided herewith]). (Appeal from Order of Oswego County Family Court, Roman, J.—Child Support.) PRESENT: CALLAHAN, J.P., GREEN, BALIO, DAVIS, DOERR, JJ. (Filed Dec. 30, 1992.)

1173. (Oswego Co.)—MATTER OF STEVEN D. ROSE, COMMISSIONER OF OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O DAVID W. HANEY, APPELLANT, V ARLENE A. HANEY, RESPONDENT.—Order unanimously affirmed without costs. Memorandum: Respondent Arlene A. Haney has three children who live with their father and receive public assistance. Haney is mentally disabled and resides at the Mental Health Transitional Living Residence in Oswego County. She receives monthly social security benefits of $513 and supplemental security income (SSI) payments of $319. Haney has no other source of support. The monthly charge for her care, room and board at the facility is $832, the precise amount of her benefits.

Respondent Kimberly L. Moody has three children. Two of the children reside with her. Her son, Robert, lives with his grandmother and receives public assistance. The sole source of support for Moody and the two children residing with her is public assistance.

Petitioner commenced proceedings for child support against each respondent under article 4 of the Family Court

Act. Following hearings on the petitions, Family Court set each respondent's child support obligation at $0. We affirm.

Family Court Act § 413 (1) (g) provides, in pertinent part, that "[i]n no instance shall the court order child support below twenty-five dollars a month." The minimum support obligation mandated by the statute offers no opportunity for rebuttal by respondents or for the exercise of discretion by the court. The statute, in effect, creates a conclusive presumption that $25 is the correct amount of child support to be awarded, regardless of the parent's means and circumstances. Insofar as it establishes such an irrebuttable presumption, paragraph (g) of Family Court Act § 413 (1) directly conflicts with section 667 (b) (2) of the Child Support Enforcement Act (*see*, 42 USC §§ 651-669). The Federal statute explicitly requires:

> "There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case" (42 USC § 667 [b] [2]).

Because section 667 (b) (2) of the Child Support Enforcement Act directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded, we conclude that the provision in Family Court Act § 413 (g) mandating a $25 minimum award is preempted under the Supremacy Clause (*see*, US Const, art

VI). Family Court, therefore, properly disregarded the minimum award requirement and determined that the imposition of any support obligation upon respondents would be unjust and inappropriate. (Appeal from Order of Oswego County Family Court, Roman, J.—Child Support.) PRESENT: CALLAHAN, J.P., GREEN, BALIO, DAVIS, DOERR, JJ. (Filed Dec. 30, 1992.)

APPENDIX E—Family Court Decision

STATE OF NEW YORK

COUNTY OF OSWEGO
FAMILY COURT

In the Matter of a Proceeding for Support under Article 4 of the Family Court Act

STEVEN D. ROSE, Commissioner of Social Services, (Assignee) o/b/o EDITH L. CLANCY,

Petitioner,

-vs-

KIMBERLY L. MOODY,

Respondent.

On Objection to Hearing Examiner's Findings of Fact and Order

Docket No. F-120-91

Appearances:

Seiter & Genant, Attorneys for Petitioner, Oswego County Department of Social Services, Spring Street, Mexico, New York 13114.

Legal Services of Central New York, Inc., Heidi Siegfried, Esq. of counsel, Attorneys for Respondent, Riverfront Building, Box 1, 120 East First Street, Suite 210, Oswego, New York 13126.

Present:

(Hon.) David J. Roman, Oswego County Family Court Judge

This matter was commenced January 29, 1991, with the filing of a Petition for Support by the Oswego County Department of Social Services on behalf of Edith L. Clancy. The named Respondent, Kimberly L. Moody, is the mother of Robert L. Moody, date of birth February 13, 1987. Robert currently resides with Edith L. Clancy, his grandmother, and receives support from D.S.S. D.S.S. has alleged that the Respondent has failed to support her child. A first appearance was scheduled and effected on April 30, 1991. A temporary Order of Support, whereby the Respondent was to pay $25.00 per month, was thereafter entered with the Court on June 7, 1991. Trial on the matter was held September 25, 1991, and the Oswego County Family Court Hearing Examiner, Samuel J. Sugar, signed his Findings of Fact on October 11, 1991, and entering an Order in accord therewith on October 17, 1991.

An Objection to the Hearing Examiner's Findings of Fact and Order was received by the Court on October 30, 1991 from Petitioner's counsel. A Rebuttal to said Objection was thereafter received from the Respondent on November 13, 1991. Both parties have met the procedural requirements pertaining to Objection and Rebuttal as codified at Section 439(e) of the Family Court Act.

In its Objection, the Petitioner argues that the Respondent should be responsible for a minimum current award on behalf of her son, Robert M. Moody. Robert's current support amounts to $34.00 per week in assistance from the Department of Social Services. Petitioner premises its argument on the Child Support Standards Act, which states "in no instance shall the Court order child support below $25.00 per month". *Family Court Act,* Section 413(g).

The Hearing Examiner based his determination on two factors: first, the Respondent has absolutely no income herself as she subsists solely on public assistance and, therefore, no calculation based on income (Family Court Act, Section 413(b)(3)(i)) could be effected; and, second, the Hearing Examiner felt it would be unjust and inappropriate to order the Respondent to pay any support due to her own financial circumstances. (Family Court Act, Section 413(f)).

It is the Court's opinion that the Hearing Examiner's Findings of Fact and Order should remain intact, as it would be unjust and inappropriate to impose a current care support obligation on the Respondent at this time. The Petitioner has argued that the Child Support Standards Act does not allow any support award below $25.00 per month. (Family Court Act, Section 413(1)(d) and 413(g)) The statute, however, is silent as to the facts encountered here. The Respondent and all of her children both custodial and non-custodial, are completely dependent upon the Department of Social

Services for specific amounts of assistance per month. The Respondent receives rental assistance, food stamps and a cash grant to support herself and her two children. To require her to pay $25.00 per month in support towards her non-custodial child lowers her current monthly cash allotment from $126.00 to $101.00, a substantial percentage decrease, and arguably a penalty per se for being a public charge (presumably through no fault of her own).

It is well established by statute and case law that one of the main purpose of Family Court when dealing with children, is to protect their best interests. To order Ms. Moody to pay current care support would, in effect, lower her public assistance cash grant by approximately 20%. This would very likely be detrimental to the interests of the two children who currently reside with the Respondent, therefore rendering such an award unjust and inappropriate.

Accordingly, the Objection received October 30, 1991 is DENIED in its entirety. The Hearing Examiner's Order entered October 17, 1991 shall remain in full force and effect.

This Decision is final and shall serve as the Court's Order in these regards.

ENTER: This 2nd day of January, 1992
at the City of Oswego, New York

s/DAVID J. ROMAN

APPENDIX F—Hearing Examiner's Findings of Fact and Order

State of New York held in and for the County of Oswego at Oswego, New York on October 11, 1991

Present: Samuel J. Sugar
Hearing Examiner

STEVEN D. ROSE, Commissioner, Oswego County Department of Social Services o/b/o EDITH L. CLANCY,

Petitioner,

KIMBERLY L. MOODY,

Respondent.

SSN: 071-54-5179

Docket No. F-120-91

Order

NOTICE: Your willful failure to obey this order may, after court hearing, result in your commitment to jail for a term

not to exceed six months, for contempt of court. Specific written objections to this order may be filed with this court within 30 days after entry of the order.

The above named person or persons having appeared before a Hearing Examiner of this Court on this date in a proceeding under Article four of the Family Court Act and it appearing upon a hearing that an Order is necessary and desirable;

NOW, THEREFORE, upon all the proceedings had herein, it is

ORDERED THAT based upon all the facts and circumstances, it is the decision of the Hearing Examiner that the respondent pay the sum of $0.00 per month, current care, commencing January 29, 1991; and it is further

ORDERED THAT there is no retroactive support owed; and it is further

ORDERED THAT respondent is to report to the Support Enforcement Unit, immediately in writing, regarding any changes in residency and employment; and it is further

ORDERED THAT this order shall be enforceable pursuant to section 5241 or 5242 of the Civil Practice Law and Rules, or in any other manner provided by law.

Dated: Oct. 16, 1991

s/SAMUEL J. SUGAR
Hearing Examiner

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Findings of Fact

FAMILY COURT OF THE STATE OF NEW YORK

COUNTY OF OSWEGO

In the Matter of a Proceeding for Support under Article 4 of the Family Court Act

OSWEGO COUNTY DSS o/b/o EDITH L. CLANCY,

Petitioner,

against

KIMBERLY L. MOODY,

Respondent.

Docket No. F-120-91

Samuel J. Sugar, being the Hearing Examiner to whom the issues of support in the above-entitled proceeding were referred for determination, makes the following findings of fact:

(strike inapplicable items)

1. ~~Petitioner and Respondent were married on and (are still husband and wife) (were divorced on~~

2. ~~There is no issue of this marriage.~~

3. ~~Petitioner and Respondent were never married to each other.~~

4. There ~~are~~ is one child~~ren~~ aged 4 for whose support Respondent is liable by virtue of: (state basis for support liability) natural mother

5. The following children reside with (Petitioner) (~~Respondent~~): (Give names, dates of birth, and specify with whom they reside) Robert M. Moody 2/13/87 with petitioner

6. (~~Petitioner~~) (Respondent) failed ~~without good cause~~ to file a net worth statement.

*7. Respondent willfully failed to obey the order of this court, namely:

**8. ~~Respondent showed good cause for failing to make application for relief from the judgment or order directing payment of support prior to the accrual of the arrears alleged herein in that: (set forth facts and circumstances constituting good cause)~~

*9. The following are the reasons for denying certain requests for relief made herein: See Decision in paragraph # 11

10. ~~Attached and made a part hereof is (Appendix A) (and) (Appendix B) hereto.~~

11. Other findings of fact: (potential for support; other child support obligations; support payments previously made; efforts to supplement income; efforts to find employment; if proceeding is for modification, include facts pertaining to change of circumstances.)

DECISION

The within Petition for Support on behalf of one child was filed January 29, 1991. A temporary order was made on April 30, 1991, directing support in the sum of $25.00 per month beginning May 3, 1991.

A Hearing in this matter was held on September 25, 1991. Petitioner appeared through its attorney Mary McGowan, Esq. and respondent appeared pro se.

Petitioner established that since the date of filing of the within petition one child of respondent was in receipt of public assistance. The amount of current care assistance being provided was $34.30 per week.

Respondent testified that she herself is the recipient of public assistance as are her two children who reside with her. Respondent receives $528.00 per month for rent which is vouchered directly to the landlord, $126.00 per month cash, and $70.00 per month food stamps. Respondent is currently making weekly payments to Rainbow for beds for her children and a television. Respondent exercises rights of visitation with the child every weekend from Friday evening at dinnertime until Sunday evening at dinnertime.

Respondent's Family Court Act Section 413(1)(b)(5) "income" is $0.00 annually.

Respondent's basic child support obligation for one child pursuant to the Child Support Standards Act is 17 percent of $0.00 per year. Respondent's income less the amount of child support calculated hereinabove amounts to less than

the poverty income guidelines of $6,620.00 per year and pursuant to Family Court Act Section 413(1)(d) respondent's support obligation is limited to $25.00 per month.

Respondent's contribution to support of the child as determined hereinabove is unjust and inappropriate because respondent and her two children are themselves the recipients of public assistance, respondent and her two children require all of their public assistance grant for their own support, and respondent is not employed and has no earned income. Said public assistance grant is calculated to provide solely for the needs of respondent and her two children and not the needs of another person.

Based upon all the facts and circumstances, it is the decision of the Hearing Examiner that the Respondent pay the sum of $0.00 current care support commencing January 29, 1991. There is no retroactive support.

Dated: October 11, 1991

s/SAMUEL J. SUGAR
Hearing Examiner

Supreme Court, U.S.
FILED
APR 20 1994
OFFICE OF THE CLERK

(2)

No. 93-1520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Petitioner,

v.

KIMBERLY L. MOODY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

HEIDI SIEGFRIED
(Counsel of Record)
FREDERICK M. STANCZAK
LEGAL SERVICES OF
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(315) 342-2191
Counsel for Respondent.

April 20, 1994

Washington, D.C. • THIEL PRESS • (202) 328-3288

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Question Presented

Should a petition for a writ of certiorari be granted to review a New York State Court of Appeals decision holding that a provision of the Family Support Act of 1988, requiring states to establish child support guidelines as rebuttable presumptions of the correct amount of support to be awarded, preempts state provisions resulting in guidelines which cannot be rebutted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

KIMBERLY L. MOODY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

HEIDI SIEGFRIED, ESQ.*
FREDERICK M. STANCZAK, ESQ.
LEGAL SERVICES OF CNY, INC.

Statement of the Case

Statutory Background

New York State operates a Child Support Enforcement Program under Titles IV-A and IV-D of the Social Security Act of 1935, as amended. This program is based on a scheme of "cooperative federalism". *King v. Smith*, 392 U.S. 309, 316 (1968); *Heckler v. Turner*, 470 U.S. 184, 189 (1985). The federal program reimburses each state which chooses to participate with a percentage of the funds it expends. In return, the State must administer its program pursuant to a state plan that conforms to the applicable federal statutes and regulations.

Pursuant to 42 USC § 602(a)(26), applicants or recipients of public assistance are required, as a condition of eligibility, to assign their support rights to the Department of Social Services. The Department of Social Services then, "on behalf of" the recipient, pursues support from the non-custodial parent. The first $50 per month of any support collected is provided to the recipient over and above their regularly recurring monthly public assistance grant as an incentive for cooperating with the child support unit. Any current support above $50 per month or any arrears are retained by the Department.

Congress, in the Family Support Act of 1988, 102 Stat 2343 § 103 (1988), amended the Social Security Act at 42 U.S.C. § 667 to require that "Each state, as a condition for having its state plan approved under this part, must establish guidelines for child support amounts within the state." Subsection (b) (2) requires that

> There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the state, shall be sufficient to rebut the presumption in the case.

The Department of Health and Human Services promulgated regulations pursuant to the statute providing in pertinent part:

> (a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.
>
> * * * * *
>
> (f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph "a" of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph "a" of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

* * * * *

45 C.F.R. 302.56

The Office of Child Support Enforcement (OCSE) of the United States Department of Health and Human Services, in promulgating these regulations, specifically considered that some states had already adopted standards that did not allow deviations from the guidelines. OCSE said that:

> States have considerable leeway in establishing criteria for rebuttal as long as these criteria are established by the State and take into consideration the best interests of the child. However the absence of any grounds for rebuttal would appear to be inconsistent with the statutory language and the intent of Congress that the guidelines be used as a rebuttable presumption in the establishment of all orders in

> the state. Section 667 does not allow State guidelines which are applied in all cases with no opportunity for rebuttal of the amount indicated in the guidelines. (emphasis added)

56 Fed. Reg. 22348.

The New York State Child Support Standards Act

The New York State legislature enacted the Child Support Standards Act pursuant to the Family Support Act in its 1989 legislative session. L 1989, ch 567. The Act begins by providing that parents, "if possessed of sufficient means or able to earn such means, "shall be required to pay child support as determined pursuant to the guidelines that follow. Family Court Act § 413(1)(a).

Paragraph 413 (1) (c) of the Family Court Act provides for application of guidelines based on a pro rata share of a certain percentage of the combined parental income. "Income", defined at § 413(1)(b)(5), is not to include public assistance, supplemental security income, FICA taxes, or child support or maintenance actually paid to someone outside the household.

Notwithstanding paragraph (c), the Act provides, at paragraph (d) that, where the annual amount of the basic support obligation would reduce the non-custodial parent's income below the poverty income guidelines for a single person as reported by the federal department of health and human services, the basic child support obligation is limited to the greater of 25 dollars per month or the difference between the non-custodial parent's income and the self support reserve (135% of the poverty income guidelines for a single person).

The legislature established criteria or factors at paragraph 413(1)(f) for rebuttal of the presumptive guidelines. Among these criteria is a consideration of the financial resources of the custodial and non-custodial parent and those of the child, Family Court Act § 413(1)(f)(1), and the needs of any children of the non-custodial parent not subject to the instant action if the resources available to support such children are less than the resources available to support the children of the instant action. Family Court Act § 413(1)(f)(8).

However at § 413(1)(g) it provides that in no instance shall the court order child support below twenty five dollars a month, thus creating an irrebuttable presumption that all persons subject to the Act are able to pay $25 per month to support that child.

The provisions of New York's Child Support Standards Act were made a part of the State's plan, which was approved by the federal Department of Health and Human Services, as stated by petitioner. However, the Department has indicated that it is now studying how 413(1)(g) operates and whether, in application, exceptions are ever allowed to determine whether the $25 minimum allows opportunity for showing that such amount is unjust or inappropriate in a particular case in order to rebut the presumption. Presumably, if it finds that there is a conflict with federal requirements for rebuttability, funding of New York's Child Support Enforcement Program will be jeopardized.

Factual Background of the Instant Controversy

Respondent Kimberly Moody has three children. At the time this matter began, in January 1991, two of her children lived with her, and her firstborn son lived with her

mother, Edith L. Clancy. The respondent and all of her children, both custodial and non-custodial, were completely dependent upon the Department of Social Services for assistance, through no fault of the respondent's.

In January 1991, the Oswego County Department of Social Services filed a petition for support on behalf of Edith Clancy. Following a hearing before Hearing Examiner Samuel J. Sugar in September, 1991, the hearing examiner issued an order and findings of fact awarding $0.00 per month in child support. In his decision the hearing examiner found that the respondent's income, pursuant to Family Court Act § 413(1)(b)(5) was $0.00 annually and that her basic child support obligation pursuant to the Child Support Standards Act was 17% of $0.00 or $0.00. He further determined that, since $0.00 income is less than the poverty level, application of the guideline at § 413(1)(g) would set her child support obligation to $25 per month. However, he found that application of this basic child support obligation would be unjust and inappropriate since respondent and her two custodial children were themselves recipients of public assistance. In January, 1992 the Oswego County Family Court, Roman, J., upheld the findings of fact and order of the hearing examiner.

On December 30, 1992 the Appellate Division, Fourth Judicial Department, unanimously affirmed the order and issued a memorandum opinion finding that the Federal Child Support Enforcement Act directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded, that § 413(1)(g) in effect creates a conclusive presumption that $25 is the correct amount of child support to be awarded regardless of the parent's means and circumstances, and that the provision in the Family Court Act § 413(g) [sic] mandating a $25 minimum award is preempted

under the Supremacy Clause. Rose, Matter of v. Haney, 188 AD2d 999 (4th Dept 1992). The Court ruled that the Family Court, therefore, properly disregarded the minimum award requirement and properly determined that the imposition of a $25 support award would be unjust and inappropriate.

The New York State Court of Appeals affirmed this decision. Rose, Matter of v. Moody, 188 AD2d 1001 (4th Dept 1992), *affd*, __ NY2d __ (December 20, 1993) (Westlaw 1993 WL 522515). It noted that the state's statutory criteria for rebuttal include consideration of the financial resources of the custodial parent, non-custodial parent and child as well as the financial needs of any children of the non-custodial parent not subject to the particular support proceedings. It noted that a comparative resource analysis of the respective support needs of the custodial and non-custodial child who is the subject of the proceeding is also appropriate under the statutory criteria for rebuttal. The Court of Appeals ruled that the mother in this case, having custodial children without resources and in need of public assistance, satisfied these criteria. Petitioner has asserted that the Court of Appeals did not refer to the statutory criteria for rebuttal, but, as can be seen, they consider those criteria.

The Court of Appeals found that Section 667 of the Family Support Act of 1988 gives a non-custodial parent the right to rebut any presumed support amount all the way down to zero and agreed with the Appellate Division that 42 U.S.C. 667(b)(2) directly prohibits a state from enacting child support guidelines which permit no rebuttal and thus preempt, under the Supremacy Clause, the provision in the Family Court § 413(1)(g) mandating a $25 minimum award. (emphasis added.)

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners seek to elevate a simple preemption case into an issue worthy of this Court's exercise of its scarce review resources. They attempt to do this by suggesting that the New York Court of Appeals has not recognized the need to look closely at the intent of Congress in considering whether a provision of the Family Support Act requiring child support guidelines to be rebuttable preempts state provisions establishing a guideline for indigent people which cannot be rebutted.

1. The Court of Appeals Decision is Not in Conflict with any Decision of this Court or of Any Other Court of Appeals Involving Review of State Domestic Relations Clause Under the Supremacy Clause and the Spending Power

The New York Court of Appeals used the proper standard of review in concluding that the provisions of New York's Family Court Act, § 413(1)(d) and (g), establishing a child support guideline of $25 per month for indigent people, which cannot be rebutted, violate the Supremacy Clause, because they conflict with a federal statute that requires all such guidelines to be a rebuttable presumption.

The Supremacy Clause provides that "this consitution and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land...any thing in the constitution or law of any state not withstanding" Art VI cl. 2. Given this, all state provisions which conflict are without effect. See, e.g., *McCulloch v. Maryland*, 4 Wheat 316 (1819); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

The preemption doctrine requires state law to defer to federal legislation where a federal interest is so dominant that it precludes enforcement of state laws on the same subject, where the state policy may produce an inconsistent result with the objective of a federal statute, where compliance with both federal and state regulations is a physical impossibility, or where the law stands as an obstacle to the accomplishment and execution of the full purposes of Congress. *Maryland v. Louisiana*, 451 U.S. at 746-747.

Because family law matters are ordinarily left to the states, this Court has emphasized the necessity to make certain that Congress has intended to preempt state law in this particular area. For example, in *Wetmore v. Markoe*, 196 U.S. 68 (1904), the Court determined that the federal bankruptcy law did not enable the plaintiff to discharge his accrued alimony and child support, because these are in the nature of an obligation between spouses and to children rather than a debt provable in bankruptcy. The Court said:

> Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor, to make the law a means of avoiding the enforcement of an obligation.

Wetmore v. Markoe, 196 U.S. 68, 77.

In *United States v. Yazell*, 382 U.S. 341 (1966), this Court, in deciding that the Small Business Administration could not override the Texas law of coverture to reach a married woman's separate property, said:

> We do not here consider the question of the constitutional power of the Congress to override

> state law in these circumstances by direct legislation or by appropriate authorization given to an administrative authority coupled with suitable implementing action by the agency. We decide only that this court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here.

United States v. Yazell, 382 U.S. 341, 352.

The pertinent question is "whether the right asserted conflicts with the express terms of federal law". *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). This Court concluded in that case that various provisions of the Railroad Retirement Act did evidence a congressional intent to protect Railroad Retirement Benefits for the beneficiary, and thus prevented the spouse of a beneficiary from considering those benefits as community property under state law.

This Court in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 115 L Ed 2d 410 (1991) stated that "Congress may legislate in areas traditionally regulated by the states", but that the provision in question in that case, involving the power of a state to prescribe the qualifications of their own officers, went "beyond an area traditionally regulated by the States" to "a decision of the most fundamental sort for a sovereign entity". *Gregory v. Ashcroft*, 111 S.Ct. at 2400. This Court repeated the need to find that Congress had made its intention unmistakably clear in the language of the statute before deciding that federal law overrides state law, calling this the "plain statement rule", found that it was at least ambiguous whether Congress intended that a state judge be covered by the federal Act in question, and so resolved the

issue in favor of the state.

The instant case is distinguishable from those cited by petitioner in that, unlike *Yazell*, there is federal legislation and in that Congress' enactment in the instant case is far more direct than that in *Wetmore*, *Gregory*, or *Hisquierdo*. Congress clearly is intervening in the area of family law, by requiring states to adopt child support guidelines. Petitioner does not question the right of Congress to involve itself in family law by requiring these guidelines. Congress went further in requiring that all of these guidelines be used by the court as a rebuttable presumption of the correct amount of support to be awarded.

Congress acted here pursuant to its spending power making it an essentially contractual obligation that New York State comply with the provisions of the Family Support Act. This Court has repeatedly upheld the power of the United States to fix the terms upon which its money to the states may be disbursed where it does not have the power to regulate local activities, see *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), even in cases involving the power of a state to prescribe the qualifications of their own officers. See *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), in which the Court upheld the removal of a state highway commissioner who was also chairman of the state Democratic party, where federal highway funds were conditioned upon compliance with provisions of the Hatch Act.

Petitioner mischaracterizes *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973), as standing for stringent preemption principles applying to Aid to Families with Dependent Children programs funded by the federal government. In that case this Court did not find a

clear intent of Congress in enacting the WIN program to terminate all existing state work programs, which the Court saw as complementary. However, it still remanded the question of whether some particular sections of the state work program might conflict with specific provisions of the Social Security Act. Here, Congress has made clear its intent that guidelines be rebuttable presumptions, and the New York State provisions clearly conflict by creating guidelines which cannot be rebutted. In addition, unlike in *Dublino*, the Department of Health and Human Services made clear in the promulgation of its implementing regulations that it recognized that some states had already adopted standards that did not allow deviations from the guidelines and said that Section 667 does not allow State guidelines which are applied in all cases with no opportunity for rebuttal of the amount indicated in the guidelines. 56 Fed. Reg. 22348.

The provision of the Family Court Act at § 413(1)(g) prohibiting a court from ordering support below $25 per month prevents a court from rebutting the $25 guideline found at 413(1)(d) of the Act and prevents other guidelines from being fully rebutted all the way down to zero.

The decision of the New York Court of Appeals found that 42 U.S.C. § 667(b) 2) directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded, that that provision gives a non-custodial parent the right to rebut any presumed support amount all the way down to zero, and that it thus preempts the provision in the Family Court Act § 413(1)(g) mandating a $25 minimum award.

2. The Decision of the Court of Appeals Ensures that This Court's Decisions Regarding Due Process of Law are Upheld

In enacting the Family Support Act of 1988, Congress had a clear and substantial government interest in ensuring that child support guidelines did not do major damage to due process of law. The mandatory minimum child support provision in New York's Family Court Act violates the due process clause of the United States Constitution.

Under the 14th amendment of the United States Constitution, persons in the respondent's position are protected from a deprivation of property without due process of law. This Court has repeatedly held that statutory provisions which contain irrebuttable presumptions, which operate to deprive a person of a property or liberty interest without due process of law, violate the federal due process clause. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972), (striking that portion of a state's statute which created a presumption that an unwed father is necessarily unfit as a parent); *United States Dept. of Agriculture v. Murray*, 413 U.S. 508 (1973), (holding that Section 5(b) of the Food Stamp Act of 1964, as amended in 1971, which created a presumption that any household which included a person 18 years of age or older and who had been claimed by another person as a dependent for federal income tax purposes during the previous year, would be ineligible for food stamps during the subsequent year, as violative of due process); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), (striking a rule which required pregnant school teachers to take unpaid maternity leave within four to five months of the expected birth date, not withstanding evidence of an ability to continue teaching); *Vlandis v. Kline*, 412 U.S. 441 (1973), (rejecting the statutory rule which created a presumption that certain persons were not "residents" of the state for purposes of qualifying for lower tuition at state funded universities without the opportunity to rebut the presumption).

In *Matthews v. Eldridge*, 424 U.S. 319 (1976), this court held that a balancing test must be applied to questions in which a state statutory provision is alleged to violate the due process clause. The test was stated as follows:

> First, the private interest that will be effected by the official action; Second, the risk of erroneous deprivation of such interest due to the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail.

Id. at 335.

Under the current statutory scheme, New York's Family Court Act operates to deprive a person who lives at or below the subsistence level of $25 per month, regardless of the circumstances which may render that result unjust or inappropriate. Family Court Act § 413(1)(d) and (g). There can be no question but that the deprivation of any income from a person who subsists on welfare benefits is substantial. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970), (recognizing the importance of public assistance benefits to recipients); and *Almanares v. Wyman*, 453 F.2d 1075, 1089 (1971), cert denied 405 U.S. 944 (1972).

Applying the above principles to the present case, it is apparent that New York's scheme of imposing a nonrebuttable $25 minimum award upon persons whose income is below the poverty level violates the due process clause of the United States Constitution. As the Family Court hearing examiner initially noted in this case, the imposition of a $25 award upon

respondent Moody, would have reduced her public assistance benefits by almost 20%, thereby substantially impairing her ability to care for herself and her custodial children.[1] Thus, there can be no question but that, for purposes of the *Matthews v. Eldridge* analysis, there is a substantial private interest at stake. There is also a significant risk that the imposition of the $25 minimum order will be unfair and inappropriate in many cases. This is particularly true within the context of child support orders which, under New York law, cannot be modified or corrected retroactively in favor of the non-custodial parent; See Family Court Act § 451; cannot be discharged in bankruptcy, 11 U.S.C. § 523(a)(5); and can even be collected from Social Security Disability benefits. 42 U.S.C. § 659(a). Further, support payments may be collected by the garnishment of earnings at a rate which is far more severe than that which is allowed for other debts. (Up to 60% of earnings, Civil Practice Law & Rules § 5241). Finally, when such support is sought by the New York State Department of Social Services, it is effective as of the date on which the public assistance began for the child. Family Court Act § 449.

The next step in the *Eldridge* analysis is to consider whether or not there would be any additional burden for the state to provide a hearing in which to rebut the imposition of the $25 minimum order. See *United States Dept. of Agriculture v. Murray*, 415 U.S. 508 (1972). (The presumption of an individual's ineligibility for food stamps held unconstitutional based, in part, upon the relative ease

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[1]It is also important to recognize that the Family Court did not find that any poor person should be excused from the $25 minimum order. Rather, the Court based its decision on the particular circumstances of this case, particularly the fact that respondent Moody has custodial children of her own.

with which individualized determinations could be provided). Clearly here, as in *Murray*, supra, the state incurs no substantial burden whatsoever in providing respondent Moody, or others in her situation, with an opportunity to rebut the presumption that the $25 minimum award is appropriate. Under the statutory scheme, the respondent is already allowed an opportunity for a hearing. Thus, there can be no significant additional burden upon the state. Finally, the government has no interest in obtaining $25 orders against indigent non-custodial parents. As already noted, the state can obtain a fair order, which applies retroactively to the time assistance began for the child, under provisions of the Family Court Act § 440 and § 449. This can be accomplished without the need to impose irrebuttable presumptions such as that contained at § 413(1)(d) and (g) of the Family Court Act.

Finally, it can be inferred from the reading of the Family Support Act that Congress intended to enforce the 14th amendment rights of non-custodial parents by enacting the rebuttable presumption provision found at 42 U.S.C. § 667(b)(2). As this Court noted in *Gregory v. Ashcroft*, _ U.S. ___, 111 S.Ct. 2395 (1991), the Court will find a congressional intent to enforce a constitutional provision through statutory language where the plain language of the statute indicates such an intent. *Id.* at 2404-06. Here, such an intent is plainly stated by the language of § 667(b)(2) itself which flatly prohibits the establishment of irrebuttable presumptions in the setting of child support guidelines. This is the same type of statutory provision which, under the due process clause, has been repeatedly prohibited by this Court. *Stanley v. Illinois*, supra, *Cleveland Board of Education v. LaFleur*, supra, *Vlandis v. Kline*, supra.

Therefore, the congressional prohibition of irrebuttable presumption is not only consistent with but seeks to enforce

the due process rights of respondent Moody, consistent with prior decisions of this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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